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EXTRA EXCEL (MALAYSIA) SDN BHD

v.

CHU NYUK TAI

B

COURT OF APPEAL, PUTRAJAYA
LOW HOP BING JCA
ABDUL WAHAB PATAIL JCA
AZAHAR MOHAMED JCA
[CIVIL APPEAL NO: S-02-1434-2009]

C

3 NOVEMBER 2014

CIVIL PROCEDURE: *Appeal - Record of appeal - Failure to file supplementary record of appeal enclosing sealed order of High Court - Whether non-compliance a mere irregularity - Whether resulted in there being no sealed order of High Court being filed - Whether record of appeal defective - Whether appeal nullified - Rules of the Court of Appeal 1994, r. 18(4)(d)*

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By virtue of a distributorship agreement ('the agreement'), the defendant appointed the plaintiff as the distributor of the defendant's product. Subsequently, the defendant terminated the plaintiff's services on allegations that the plaintiff had engaged in price-cutting activities which was against the terms of the agreement. The plaintiff sued the defendant, and claimed for, *inter alia*, specific performance of the agreement and general damages. The High Court allowed the plaintiff's claim. Hence, the defendant appealed against the said decision of the High Court. The plaintiff, however, raised a preliminary objection. According to the plaintiff, the defendant was directed by the Registrar of the Court of Appeal to file a supplementary record of appeal enclosing the sealed order of the High Court. It was submitted by the plaintiff that the defendant had failed to comply with the said directive. The supplementary record of appeal was only filed outside the deadline, thus the plaintiff argued that the appeal should be struck out. The defendant, however, contended that the non-compliance should only be treated as an irregularity and should not nullify the appeal.

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Held (striking out the appeal)
Per Azahar Mohamed JCA delivering the judgment of the court:

(1) Rule 18(4)(d) of the Rules of the Court of Appeal 1994 requires that the appeal record should include the sealed order of the High Court. In addressing the issue, the plaintiff had given notice of preliminary objection to the defendant. The defendant, despite the plaintiff's notice, had made no effort or attempt at all to regularise the defective supplementary record of appeal by applying for leave to file out of time, which was inexcusable. The defendant's failure to apply for leave to regularise the record of appeal resulted in there being no sealed order of the High Court being filed. The sealed order of the High Court is the focus of the grounds of appeal and the submissions thereon. It is a fundamental rule of justice that there is no uncertainty as to the order appealed from. (para 10)

(2) Although in light of the new r. 1A inserted by the Rules of the Court of Appeal (Amendment) 2002 PU(A) 196/2002, that 'In administering any of the rules herein, the court of a judge shall have regard to the justice of the particular case and not only to the technical non-compliance of any of the rules herein', the distinction between an irregularity and a nullity no longer applies, and *Capital Insurance Bhd v. Kasim Mohd Ali* is no longer good law, the judicial consideration of the justice of the particular case warranting application of r. 1A requires that an application, in this case, for leave to file out of time is made, so that the justice of the particular case can be addressed upon affidavits and not upon statements from the bar. The record of appeal herein was found to be defective and the appeal was not competent. The plaintiff's preliminary objection was therefore upheld. (para 11)

Bahasa Malaysia *Translation Of Headnotes*

Melalui satu perjanjian pengedaran ('perjanjian'), defendan telah melantik plaintif sebagai pengedar produk defendan. Seterusnya, defendan telah membatalkan perkhidmatan plaintif atas dakwaan bahawa plaintif telah terlibat dalam aktiviti-aktiviti pemotongan harga yang melanggar syarat-syarat perjanjian. Plaintif telah menyaman defendan, dan menuntut, antara lain, pelaksanaan

spesifik perjanjian dan ganti rugi am. Mahkamah Tinggi membenarkan tuntutan plaintif. Oleh itu, defendan merayu terhadap keputusan Mahkamah Tinggi tersebut. Plaintif, walau bagaimanapun, membangkitkan bantahan awal. Menurut plaintif, defendan telah diarahkan oleh Pendaftar Mahkamah Rayuan untuk memfailkan rekod rayuan tambahan yang melampirkan perintah yang dimeterai oleh Mahkamah Tinggi. Plaintif menghujahkan bahawa defendan telah gagal mematuhi arahan tersebut. Rekod rayuan tambahan hanya difailkan luar jangka masa yang disediakan, oleh itu plaintif menghujahkan bahawa rayuan harus ditolak. Defendan, walau bagaimanapun, menegaskan bahawa ketidakpatuhan tersebut hanya boleh dianggap sebagai satu ketakteraturan dan tidak membatalkan rayuan.

Diputuskan (membatalkan rayuan)

Oleh Azahar Mohamed HMR menyampaikan penghakiman mahkamah:

(1) Aturan 18(4)(d) Kaedah-Kaedah Mahkamah Rayuan 1994 menuntut supaya rekod rayuan sepatutnya termasuk perintah yang dimeteraikan Mahkamah Tinggi. Dalam menangani isu ini, plaintif telah memberikan notis bantahan awal kepada defendan. Defendan, walaupun diberi notis plaintif, tidak berusaha atau membuat cubaan untuk mengesahkan rekod rayuan tambahan yang cacat dengan memohon kebenaran untuk memfailkan luar jangka masa, dan ini tidak boleh dimaafkan. Kegagalan defendan untuk memohon pengesahan rekod rayuan menyebabkan tiada perintah dimeterai oleh Mahkamah Tinggi difailkan. Perintah Mahkamah Tinggi yang dimeterai adalah fokus alasan rayuan dan hujahan-hujahan. Adalah satu peraturan asas keadilan supaya tidak wujudnya ketidakpastian berkenaan perintah yang dirayu.

(2) Walaupun A. 1A baru yang dimasukkan oleh Kaedah-Kaedah Mahkamah Rayuan (Pindaan) 2002 PU(a) 196/2002 bahawa 'Dalam melaksanakan mana-mana kaedah dalam kaedah-kaedah ini, mahkamah atau hakim hendaklah mengambil kira keadilan sesuatu kes dan bukan hanya ketidakpatuhan teknikal mana-mana kaedah dalam kaedah-kaedah ini', perbezaan antara ketakteraturan dan pembatalan tidak lagi digunapakai, dan *Capital Insurance Bhd v. Kasim Mohd Ali* sudah tidak lagi menjadi undang-undang yang boleh dipakai, pertimbangan

kehakiman keadilan kes tertentu yang memerlukan pemakaikan A. 1(A) menghendaki satu permohonan, dalam kes ini, untuk kebenaran memfailkan luar jangka masa dibuat, supaya keadilan kes tertentu boleh ditangani berdasarkan afidavit dan bukan atas dasar kenyataan dari meja peguam. Rekod rayuan di sini didapati cacat dan rayuan adalah tidak kompeten. Oleh itu, bantahan awal plaintif dikekalkan.

Case(s) referred to:
Capital Insurance Bhd v. Kasim Mohd Ali [2000] 1 CLJ 269 CA ***(not foll)***

Legislation referred to:
Courts of Judicature Act 1964, s. 42(1)
Rules of the Court of Appeal 1994, rr. 1A 18(4)(d)

For the appellant - Alexander HW Siew; M/s Alex Siew & Co
For the respondent - Lim Pitt Kong; M/s PK Lim & Co

[Editor's note: For the High Court judgment, please see Chu Nyuk Tai v. Extra Excel (Malaysia) Sdn Bhd [2009] 1 LNS 783.]

Reported by Suhainah Wahiduddin

JUDGMENT

Azahar Mohamed JCA:

[1] This was Extra Excel (Malaysia) Sdn Bhd's appeal (the defendant in the High Court) against the decision of the High Court given on 22 June 2009 in allowing Chu Nyuk Tai's claim (the plaintiff in the High Court) against Extra Excel (Malaysia) Sdn Bhd.

[2] It would be convenient to describe the parties in this judgment as they appear in the High Court.

[3] When this appeal came up before us on 10 January 2012, learned counsel for the plaintiff raised a preliminary objection to the appeal. Upon hearing both counsels, we unanimously upheld the preliminary objection. Accordingly, we ordered that the defendant's appeal be struck out.

[4] We now give our reasons for so deciding.

[5] The brief facts of the case giving rise to this appeal are these. On 30 June 1997 by virtue of a distributorship agreement ("the agreement"), the defendant appointed the plaintiff as the

distributor of the defendant's product. On 28 June 2006, the plaintiff received a letter of suspension from the defendant suspending the plaintiff for three months as it was alleged that the plaintiff had behaved unethically by engaging in price-cutting activities which was against the terms of the agreement. Before the expiry of the three months and without holding a due inquiry, the defendant terminated the plaintiff's services. The plaintiff sued the defendant, contending that her suspension was in breach of the agreement. The plaintiff claimed for a declaration that the suspension is null and void, specific performance of the agreement, general damages including loss of earnings and damages for wrongful publication of the suspension. After a full trial the High Court allowed the plaintiff's claim except for the claim for bonus payments. The High Court also ordered the defendant to pay the plaintiff RM2,000 as general damages for the plaintiff's loss of profits and RM50,000 as general damages for wrongful publication in the defendant's magazine.

[6] In raising the preliminary objection, learned counsel for the plaintiff brought to our attention the Registry of Court of Appeal's letter dated 1 December 2012 addressed jointly to both the solicitors for the plaintiff and the defendant pertaining to the appeal herein. The material part of the letter reads:

> MAHKAMAH RAYUAN RAYUAN SIVIL NO. S-02-1434-09 (Mahkamah Tinggi Kota Kinabalu Guaman Sivil No.K-22-237-2006)
>
> Extra Excel [Malaysia] Sdn Bhd - Perayu
>
> Dan
>
> Chu Nyuk Tai - Responden
>
> Dengan segala hormatnya merujuk kepada perkara di atas.
>
> 2. Dengan ini dimaklumkan bahawa rayuan tersebut di atas telah ditetapkan untuk perbicaraan di hadapan Mahkamah Rayuan Malaysia di Kota Kinabalu, Sabah pada 10hb Januari 2012, jam 9.00 pagi.
>
> 3. Menurut rekod kami, Rekod Rayuan yang Peguam Perayu failkan tidak mengandungi Perintah Termeterai. Justeru itu, Peguam Perayu hendaklah memfailkan Rekod Rayuan Tambahan yang mengandungi Perintah Termeterai dalam tempoh dua (2) minggu dari tarikh penerimaan notis perbicaraan ini.

4. Sekiranya Rekod Rayuan Tambahan tersebut tidak difailkan dalam tempoh yang telah ditetapkan, rayuan perayu akan dikeluarkan dari senarai perbicaraan dan akan ditetapkan untuk pelupusan dalam panel yang sama.

[7] In the said letter, the defendant was directed by the Registrar of the Court of Appeal to file a supplementary record of appeal enclosing the sealed order of the High Court. Learned counsel for the plaintiff submitted that the defendant had failed to comply with the directive. The supplementary record of appeal was only filed on 30 December 2011, which was outside the deadline. He therefore submitted that the record of appeal was defective and the appeal ought to be struck out.

[8] In opposing the preliminary objection, learned counsel for the defendant contended that the non-compliance should be only treated as an irregularity and should not nullify the appeal.

[9] In addressing this issue, the important point to note is that on 9 January 2012, the plaintiff gave notice of preliminary objection to the defendant. The material part of the objection reads:

3. the appeal is not competent because:

(a) subject to proof by the Appellant, the Appellant only filed the Supplementary Record of Appeal on or about 30 December 2011 containing the omitted signed and sealed High Court Judgment dated 22 June 2009 after the expiry of 2 weeks from the date of receipt of the Notice of Hearing dated 01 December 2011. The Respondent's Advocates, Messrs P. K. Lim & Co received the said Notice of Hearing dated 01 December 2011 by fax on 02 December 2011 followed by post on 09 December 2011; and

(b) subject to 3(a) hereof, if the Objection is established, the Appellant made no attempt to apply for leave from the Court of Appeal to file or regularize the Supplemental Record of Appeal out of time containing the signed and sealed High Court Judgment dated 22 June 2009.

[10] Rule 18(4)(d) of the Rules of the Court of Appeal 1994 requires that the appeal record should include the sealed order of the High Court. Despite the plaintiff's notice, the defendant made no effort or attempt at all to regularise the defective supplementary record of appeal by applying for leave to file out of time the said

record. The failure on the part of the defendant to apply for leave was therefore inexcusable. The failure on the part of the defendant to apply for leave to regularise the record of appeal resulted in there being no sealed order of the High Court being filed. The sealed order of the High Court is the focus of the grounds of appeal and the submissions thereon. It is a fundamental rule of justice that there is no uncertainty as to the order appealed from.

[11] Although in the light of the new r. 1A inserted by the Rules of the Court of Appeal (Amendment) 2002 PU(A) 196/2002, gazetted 16 May 2002 and effective 17 May 2002, that "In administering any of the rules herein, the court or a judge shall have regard to the justice of the particular case and not only to the technical non-compliance of any of the rules herein", the distinction between an irregularity and a nullity no longer applies, and *Capital Insurance Bhd v. Kasim Mohd Ali* [2000] 1 CLJ 269 is no longer good law, the judicial consideration of the justice of the particular case warranting application of r. 1A requires that an application, in this case, for leave to file out of time is made, so that the justice of the particular case can be addressed upon affidavits and not upon statements from the bar.

[12] For reasons aforesaid, the plaintiff's preliminary objection was upheld. We held that the record of appeal was defective; the appeal was not competent. On this ground alone this appeal was struck out. We ordered that the deposit of RM500 be given to the plaintiff on account of costs.

[13] This judgment is prepared pursuant to s. 42(1) of the Courts of Judicature Act 1964 as our learned brother Low Hop Bing, JCA has since retired.